IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

SPECIAL CRIMINAL APPLICATION No 132 of 2000

with

SPECIAL CRIMINAL APPLICATION No 771 of 2000

to

SPECIAL CRIMINAL APPLICATION No 778 of 2000

For Approval and Signature :

Hon'ble MR. JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ELECTREX (INDIA) LTD.,

Versus

STATE OF GUJARAT

Appearance:

None present for Petitioners

MR SAMIR DAVE APP for Respondent No. 1

MR AD SHAH for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of Decision: 02/05/2001

C A V COMMON JUDGMENT

#. All these 9 Special Criminal Applications arise from 9 criminal complaints filed by the respondent No.2 against the petitioners. The facts and parties are common in all 9 criminal complaints filed by respondent No.2 for conviction and sentence of the petitioners under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "Act, 1881") and as said earlier the same proceed on identical facts. In fact the separate criminal complaints are to be filed for dishonour of different cheques. The parties are common and identical prayer has been made in these matters. The grounds raised for quashing and setting aside of the criminal complaints are identical and the matters are taken up for hearing together and are being decided by this common order.

#. The facts of the case are taken from the Special Criminal Application No.132 of 2000. The first petitioner is a company incorporated under the Companies Act, 1956 having its registered office at 2121-DI, 2nd Phase, Peenya Industrial Area, Bangalore - 560 058 and having office at Bombay at the address mentioned in the cause title of the petition. The petitioner No.2 to 6 are directors of the company. The respondent No.1 is State of Gujarat and respondent No.2 is the company registered under Companies Act having main objects of financier and carrying on his business from the address mentioned in the cause title of the petition.

#. The respondent No.2 on or about August, 1995 at the request made by the petitioners have financed for purchase of machinery and entered into a Hire Purchase Agreement with the second respondent on 24.8.1995. The respondent No.2 after deducting first/initial Hire purchase rental and fee amount to be paid by the petitioners have disbursed a sum of Rs.1,93,99,109/= (Rupees One crore ninety three lac ninety nine thousand one hundred and nine only). As per the agreement of 24.8.1995 the sum advanced by the respondents have to be paid by the petitioners in 36 monthly installments of Rs.7,72,156/= commencing from 24.8.1995 and ending on 24.7.1998. The petitioners pursuant to the agreement

dated 24.8.1995 have handed over to the respondent No.2 in all 15 cheques of Rs.7,81,343/= each aggregating to Rs.1,17,20,395/- as and by way of collateral security for repayment of 36 installments as per the agreement aforestated. It is the case of the petitioners that all those 15 cheques have been signed by the petitioner No.4. There were the post dated cheques as and by way of collateral security. The petitioners No.2 and 4 have also given personal guarantee for this sum advanced to the petitioners by the respondent No.2 The respondent No.2 has also given the bill discounting facility to the petitioners. The petitioners have discounted bills with the respondent No.2 The petitioners have also given the post dated cheques as and by way of collateral security to the respondent No.2. The respondent No.2 has deposited all the above post dated cheques with their bankers viz. Allahabad Bank, Nanpura Branch for clearance on 1.7.1998. All the post dated cheques so deposited were returned / dishonoured by the petitioners' banker viz. Canara Bank, Colaba Branch, on 2.7.1998. The petitioners' bankers on the said day informed the respondent No.2's banker viz. Allahabad Bank, Nanpura Branch by their written memo dated 2.7.1998. The petitioners submit that as per the agreement dated 24.8.1995 the respondent No.2 had no authority whatsoever to deposit the said post dated cheques issued by the petitioners in favour of the respondent No.2 by way of collateral security. The grievance of the petitioner is that the respondent No.2 could not have deposited the said post dated cheques given as and by way of security without intimating the petitioners. After bounced of the cheques aforesaid it is not in dispute that the respondent No.2 issued statutory notice under Section 138 of the Act, 1881 on 23.7.1998 through its advocate to all the petitioners at their addresses. Those legal notices have been received by the petitioners on 25.7.1998. It is also not in dispute that the respondent No.2 has filed complaints under Section 138 of the Act, 1881 in the court of Judicial Magistrate, Fist Class, 3rd court, Surat being Criminal Complaints No. 6479 of 1998 to 6482 of 1998 and 6486 of 1998 to 6490 1998 against the petitioners. The petitioners state that one M/s.Times Guarantee Limited having its registered office at Ground Floor, Times of India building, Dr.D.N.Road, Mumbai-400001 has filed winding up petition under Section 433(e) and 434 of the Companies Act, 1956 (hereinafter referred to as "Act, 1956") in Karnataka High Court on 11.2.1999 which was registered as Company Petition No.40 of 1999 against the first petitioner company. In the winding up petition what it is averred by the petitioners that the petitioner therein M/s.Times Guarantee Limited,

has taken out the company Application No.74 of 1999 for appointment of provisional Liquidator. Further prayer has also been made in that application for injunction restraining the petitioners, their servants and agents from selling, transferring, alienating or encumbering any of the company's assets. The petitioners stated that there are other company petitions which are filed in Karnataka High Court, Bangalore against the petitioner No.1 company of winding up thereof under Act, 1956. Those petitions are stated to have been accepted and the winding up court issued a show cause notice to the petitioner No.1 company. The petitioners submit that some of the creditors have also issued statutory notices under Sections 433 and 434 of the Act, 1956 calling upon the petitioner No.1 to show cause as to why company should not be wound up. The petitioners submit that in view of winding up petitions field and pending in the Karnataka High Court under Sections 433 and 434 of the Act, 1956, the provisions of Section 536 of the said act become applicable. It is the say of the petitioners that there is no enforceable debt or other liabilities within the meaning of section 138 of the Act, 1881. The petitioners said that in view of the Section 536(2) read with Section 441 of the Act, 1956 the proceedings under Section 138 of the Act, 1881 is not maintainable. The petitioners further submit that there is a legal bar to disposition of the property by the company or its directors and, therefore, the company cannot make payment after the winding up proceedings have been initiated. This legal bar as what it is averred is more particularly stated under Section 536(2) read with Section 441 of the Act, 1956.

#. The petitioners further submit that there can be no offence under section 138 of Act, 1881 in the event of the petition of winding up of the company is presented in view of the clear provision of section 536(2) of the Act, 1956. By presenting company petition for winding up the operation of section 536(2) read with section 441(2) of the Act, 1956 will come into effect and because of the same the company is not able to pay the said amount to any creditor as the said payment would be void in the light of sections 536(2) and 441 of the Act, 1956 will come into effect and because of the same the company is not able to pay the said amount to any creditor as the said payment would be void in the light of the aforesaid provisions.

#. The petitioner submitted that the petitioner No.1 company has filed reference before BIFR under SIC (SP) Act, 1985 (hereinafter referred to as Act, 1985") and the

Board has registered the reference under section 15(1) of the Act, 1985 being the reference No. 49 of 2000. In view of the reference filed by The petitioners under Section 15(1) of the Act, 1985, all the proceedings filed under the provisions of the Act, 1881 are suspended unless and until the Board finally decides the reference.

#. Making reference to the provisions as contained in Sections 16 and 22 of the Act, 1985 the petitioners submit that the proceedings initiated by respondent No.2 under Section 138 of the Act, 1881 stand suspended. It is averred that complaint filed by the respondent No.2 will also not survive on the ground that the parties have arrived at a stand and agreed to accept payment in installments and have accordingly executed a consent terms which is to be filed in the court of Judicial Magistrate, First Class, 3rd Court, Surat. The petitioners in view of the said consent terms have handed over fresh 10 post dated cheques to the respondent No.2. The consent terms are dated 9.9.98. In view of the consent terms and in view of 10 postdated cheques, earlier cheques which are issued by the petitioner stand cancelled. The petitioner also made reference to the suit filed by respondent No.2 being Suit No.5823/98 in the High Court of Judicature at Bombay. It is stated that the said suit has been filed by respondent No.2 for recovery of hire charges and also handing over the possession of the machinery on which the amount was advanced by the respondent No.2. In the said suit a decree was passed on the consent terms which were made by the petitioners by executing consent terms dated 9.9.1998. The Bombay High Court what it is stated on the basis of the admissions and acknowledges made by the petitioners by executing the consent terms dated 9.9.98 was pleased to pass decree on 6.4.1999 in the suit aforestated. It is the say of the petitioners that the respondent No.2 has also agreed to extent time to make payment in installments commencing from 30.4.1999 to 30.3.2000. In view of the decree of the High Court dated 6.4.1999 the complaints which are pending before the Judicial Magistrate, First Class, 3rd Court, Surat are liable to be quashed and set aside. Reference has also been made that as per the decree dated 6.4.1999 a provision is made for the appointment of the court receiver and court receiver is appointed who has visited the factory premises of the petitioners. The reference has also been made to the summary Suit No.261 of 1998 filed by respondent No.2 to recover the amount advanced to the petitioner under the bill discounting facility. That suit has also been stated to have been decreed. The petitioner submit that the criminal complaints filed by

respondent No.2 also required to be quashed and set aside on the ground that cheques which are issued by the petitioner in favour of respondent No.2 as and by way of collateral security are not legally enforceable under Section 138 of the Act, 1881.

#. The petitioners have formulated the pointed to be urged in the matter, which are as under :-

"(a) The complaint filed by the respondent no.2 requires to be quashed in view of sec.536(2) and 441(2), 442 & 531 of the Companies Act, The said compliant is also required to be quashed in view of the fact that the reference filed by the petitioner under the provision of SIC (SP) Act, 1985. The said reference is duly registered by the board and inquiry u/s 16 is pending.

(b) The complaint is also required to be quashed and set aside in view of the fact that the consent term was arrived and duly signed by the parties to the proceedings on 9.9.1998, as per the said consent term, the earlier cheques stand discharge / invalid by issuing 10 fresh cheques by the petitioner to the respondent.

(c) The compliant is required to be quashed on the ground of decree passed by High Court.

(d) The complaint is not maintainable in view of Arbitration Clause in the agreement dated 24.8.1995".

#. In this petition, notice was issued on 16.2.2000 and the interim relief in terms of para 20(b) is granted which continues till date. The respondent No.2 has not filed any reply to the Special Criminal Application. So far as respondent No.1 is concerned he has also not filed reply to the Special Criminal Application.

#. Shri A.D.Shah, learned counsel for the respondents made oral submissions in these matters. He placed reliance on the following decisions in support of his contentions :-

(1) Anil Hegde Vs. Indian Acrylics Limited AIR 2000 SC 145.

(2) Pankaj Mehra and Anr. Vs. State of Maharashtra & Ors. JT 2000(2) SC 113.

(3) M/s. BSI Ltd. & Anr. Etc. vs. Gift Holdings Pvt. Ltd. & Anr. JT 2000(2) SC 127.

##. I have given my thoughtful considerations to the submissions made by the learned counsel for the respondent No.2.

##. In this Special Criminal Applications the petitioner prayed for quashing of aforesaid all 9 complaints. But it appears from the facts of these cases to avoid any technical objection which may come against the petitioners of misjoinder of causes of action separate petitions have been filed. In all these Special Criminal Applications, the State of Gujarat has been made a party. The State of Gujarat is neither necessary nor proper party to these petitions. These petitions arise from proceedings initiated by respondent No.2 against the petitioners for their convictions and sentences for the offences under Section 138 of the Act, 1881. These are the private complaint filed by respondent No.2. The State of Gujarat is not a prosecutor. Despite of this clear position the State of Gujarat has been impleaded as party in all these 9 matters. When State of Gujarat has been impleaded as party in these matters and the court has issued notice to it, it has no option except to instruct its advocate to appear in these matters. Consequently, heavy financial burden falls on the State of Gujarat to pay the amount of fees for the services to be rendered to it by the Government Advocate in these matters. Though the State of Gujarat is not necessary party in these matters and the petitioners also not praying any relief against it still for this impleadment of it in these matters it has to shoulder this heavy financial burden of litigation expenses. Whatever amount is spent by the State of Gujarat in defending the petitions which are filed against it is a peoples money and it is concern to the litigants to see that the party who is neither necessary nor proper in the matter may not be impleaded. It is not the case where the petitioners are laymen. The petitioners have filed these petitions through the advocate and he has to take all the care that a person who is neither necessary nor proper party to the lis is not joined. This act on the part of the

petitioners results in causing heavy financial burden to the State of Gujarat in these matters therein it is neither necessary nor proper party. It is a case where Government Advocate at the most will appear as guest artist that is what to say not to play any role. I have already taken the view in such matters the State of Gujarat is neither necessary nor proper party. In the High Court of Gujarat Rules, 1993 I do not find any provision where any obligation is there on the litigant in such matters that the State of Gujarat has to be impleaded as party as a rule. It is only a practice prevalent in the court that in all criminal matters the State of Gujarat has to be impleaded as party irrespective of the fact whether it is necessary or proper or not and further despite of the fact that against it no relief is prayed for. This practice results in putting unnecessary heavy financial burden on the State of Gujarat deserves to be discontinued so that the peoples' money may not be wasted in the litigation in which the State of Gujarat has no interest and the litigants have no lis whatsoever with the State of Gujarat.

Re: Point No.1.

##. It is an admitted fact the the criminal complaints under section 138 of the Act, 1881, have been filed by the respondent No.2 in the Court of Judicial Magistrate First Class, 3rd Court, Surat on 8-9-1998. M/s. Times Guaranty Ltd., as per the petitioners' own case, issued statutory notice under section 434 of the Act, 1956 to the petitioner-company which has been received by it on 29-9-98. The notice is dated 21-9-98. In these facts, the winding up petition being Company Petition No.40/99 could not have been presented by Time Guaranty Ltd. in the Karnataka High Court at Bangalore before three weeks of 22-9-98, the date on which statutory notice under section 434 of the Act, 1956 has been received by the petitioners. Reference, here, may have to sub-clause (a) of subsection (1) of section 434 of the Act, 1956, which reads as under:

434 (1) A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred

> rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

Leaving apart this legal position and factual aspect, from the document annexure `E' at page No.76 of the special criminal application, i.e. the copy of the petition under sections 433, 434 and 439 of the Companies Act, of the M/s. Times Guaranty Finance Ltd. filed against the petitioners in Karnataka High Court at Bangalore, it is clear that this petition for winding-up could not have been presented on or before 11-1-99. From the affidavit of S.R. Ramesh Babu, duly constituted attorney of the petitioner - compnay i.e. Times Guaranty Finance Ltd., it is clear that this petition could not have been filed on or before 11-2-99 i.e. the date on which this affidavit has been sworn in support of the petition. From these facts, which are borne out from the copies of documents filed by the petitioners themselves in this petition, there remains no doubt whatsoever that this winding-up petition being Company Petition No.40/99 has been filed in the Karnataka High Court at Bangalore by Times Guaranty Finance Ltd. on or after 11-2-99. This petition is of the year 1999 and it is filed in the year 1999. The order restraining the petitioner No.1 company herein from alienating or encumbering any of the its assets until further orders has been made by the Karnataka High Court at Bangalore in Company Petition No.40/99 with Company Application No.74/99 on 24-3-99. The criminal complaints under section 138 of the Act, 1881 were filed by the respondent No.2 in this matter much before the presentation of the first winding up petition in the Karnataka High Court at Bangalore against the petitioners. The case of the respondent No.2 is on much higher pedestal than the case which was there before the Hon'ble Supreme Court in the case of Pankaj Mehra & Ors. vs. State of Maharashtra & Ors. (supra). This matter is squarely covered by decision in that matter of the Apex Court so far as the first part of this point No.1 raised by the petitioners is concerned.

##. In the case of Pankaj Mehra & Ors. vs. State of Maharashtra (supra), their Lordships of the Hon'ble Supreme Court held as under:

29. The words "the drawer of such cheque fails to make the payment" are ostensibly different from saying "the drawer refuses to make payment". Failure to make payment can be due to the reasons beyond the control of the drawer. An illustrative case is, if the drawer is not a company but individual who has become so pauper or so sick as he cannot raise the money to pay the demanded sum, can he contend that since failure to make payment was on account of such conditions he is entitled to be acquitted? the answer cannot be in the affirmative though the aforesaid conditions can be put forth while considering the question of sentence.

"30. We therefore feel that legislature has thoughtfully used the word "fails" instead of other expressions as failure can be due to variety of reasons including his disability to pay. But the offence would be complete when the drawer "fails" to make payment within the stipulated time, whatever be the cause of such failure."

In view of this decision of the Apex Court, the contention of the petitioners that as a winding-up petition was pending against the petitioner No.1 -company, the complaints filed by the respondent No.2 under sec. 138 of the Act, 1881, has to be quashed and set aside, is devoid of any merits and substance.

So far as the second part of this first point raised by the petitioners is concerned, it is suffice to say that it is also of little help to the petitioners. This point is also squarely covered by the decision of the Apex Court in the case of M/s. BSI Ltd. & Anr. Etc. vs. Gift Holdings Pvt. Ltd. & Anr. (supra). The petitioners made a reference under sec. 15 of the Act, 1985 before the BIFR on 10-1-2000. This reference made by the petitioners has been registered by BIFR on 21.01.2000 which is borne out from the document, annexure `I' at page No.95 of the petition. I cannot do better than to reproduce herein the relevant portion of the judgment aforesaid of Hon'ble Supreme Court:

12. We do not think it necessary to labour on the scope of Section 22A of SICA in the present batch of appeals as the BIFR did not pass any order against any company involved herein until the expiry of the period of 15 days from the receipt of notice contemplated in clause (c) of the proviso to Section 138 of the NI Act. So none of the companies was interdicted by any such order envisaged in Section 22.A during the above period of 15 days. Hence, we are unable to find any help from the said provision which could salvage the appellants from the prosecution proceedings against them.

13. Switching back to sub-section (1) of Section 22 of SICA, we may point out that its operation commence in respect of the companies involved in this batch of appeals only after the expiry of the period of 15 days envisaged in clause (c) of the proviso to Section 138 of the NI Act within which the companies did not pay the amount covered by the cheques. the ban imposed, as per Section 22 (1) of the SICA, is against maintainability of the following legal actions:

(1) Proceedings for the winding up of the company;

(2) Proceedings for execution, distress or the likes against any of the properties of the company;

(3) Proceedings fro the appointment of a receiver in respect of such properties;

(4) Suits for recovery of money or for enforcement of any security against the company or guarantee in respect of any loan or advance granted to the company.

14. Some of the learned counsel pointed out that when a company is convicted under Section 138 of the NI Act the court can only impose a fine as the sentence since a juristic person like the company cannot possibly be sent to prison. On its premise, learned counsel contended that recovery of the fine covered by such sentence would be impractical on account of the ban envisaged in Section 22 (1) of SICA against proceedings for execution, distress or the likes as against any of the properties of the company.

As a corollary, it was submitted that prosecution against the company cannot be maintained since a court would not be able to effectively impose a sentence on a company after convicting it of the offence under Section 138 of NI Act.

15. The fallacy of the above contention is two-fold. First is that maintainability of a prosecution proceeding is not to be tested on the touchstone of any practical hurdle in enforcing the sentence which might be imposed on a company after conviction. Second is, there is no insurmountable hurdle for recovery of the fine covered by the sentence even from a sick industrial company because the ban contained in Section 22 (1) is only conditional as could be discerned from the last limb thereof which reads thus; "Except with the consent of the Board or, as the case may be, the Appellate Authority." It means that with such consent the court would be in a position to resort to proceedings for distress against the properties of the sick industrial company. Hence the aforesaid contention has no merit at all.

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19. The said contention is also devoid of merits. The word "suit" envisaged in Section 22 (1) cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to "recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company. As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process.

20. A criminal prosecution is neither for recovery of money nor for enforcement of any security etc. Section 138 of the NI Act is a penal provision the commission of which offence entails a conviction and sentence on proof of the guilt in a duly conducted criminal proceedings. Once the offence under Section 138 is completed the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to the penal liability. What was considered in Maharashtra

Tubes Ltd. (supra) is whether the remedy provided in Section 29 or 31 of the State Finance Corporation Act, 1951 could be pursued notwithstanding the ban contained in Section 22 of the SICA. Hence the legal principle adumbrated in the said decision is of no avail to the appellants.

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22. The conclusion which we have to draw is that if commission of the offence under Section 138 of the NI Act was completed before the commencement of proceedings under Section 22 (1) of SICA there is no hurdle in any of the provisions of SICA against the maintainability and prosecution of a criminal complaint duly instituted under Section 142 of the NI Act. The decisions rendered by the High Courts, which are assailed before us in this batch of appeals, are therefore not liable to be interfered with. Appeals are accordingly dismissed. Special Leave Petitions heard along with the above appeals are also hence dismissed.

This matter is squarely covered by this decision of the Hon'ble Supreme Court on the second part of the first point raised, no further discussion needs to be made on this contention. The prayer made for quashing and setting aside of the complaint filed by the respondent No.2 under sec. 138 of the Act, 1881, on this ground cannot be granted.

Re.: Point No.2

##. In support of this point, reliance has been placed by the petitioners on the decision of the Andhra Pradesh High Court in the case of Voruganti C. Gopaiah vs. Godavari Fertilizers & Chemicals Ltd. & another reported in 2000 DoCh. 1007. On the earlier occasion, at one point of time when Mr. Tanna argued the matter, zerox copy of the decision was given to the Court, which is lying in the file. The Andhra Pradesh High court in that case held that the liability under a dishonoured cheque issued towards the outstanding amount on a given date got wiped out where on issue thereof it was agreed by the payee to accept the payment in installments. A decision given by the court, leaving apart the fact that decision may not be binding on the court, has to be read in the context of the facts thereof. The ratio of the decision

is on the facts of that case and I have no hesitation to say that this decision is clearly distinguishable on the facts of the case. The agreement to pay liability under dishonoured cheque between the parties was after the date on which the criminal complaints were filed by the respondent No.2 under section 138 of the Act, 1881, against the drawer in the Court. Otherwise also, this point has no merits and substance. The agreement is dated 9-9-1998, a copy of which is there on the record filed by the petitioners as annexure J' at page No.107. This is captioned as "Consent Terms". It is not the case of either of the parties whether the same is presented in the Criminal Court or not. Be that as it may. To consider this point further, I consider it to be appropriate to reproduce that agreement "Consent Terms" in this judgment, which reads as under:

CONSENT TERMS

MAY IT PLEASE YOU WORSHIP:-

We, the complainant and Accused beg to submit and pray as under:-

1. The accused for themselves and undertake to the Hon'ble court to pay to the Complaint a sum of Rs.2,89,10,100/- (Rupees Two Crores Eighty Nine Lakhs Ten Thousand Only) in 10 monthly installments on the last day of each month beginning from 30th September, 1998 and ending on 30th June, 1999.

2. The accused confirms having an Undertaking (hereto annexed) in favour of the complainant on 9th September, 1998 and also confirms having handed over to the Complainant 10 post dated cheques in discharge of their total liability, as per details mentioned hereinunder:-

Sr.No. Cheque Date Amount Name of Bank.

1. 269767 30.9.98 20,00,000 Global Trust Bank Ltd..
2. 269768 31.10.98 -do- -do-
3. 269769 30.11.98 -do- -do-
4. 269770 31.12.98 -do- -do-
5. 269771 31.1.99 34,85,000 -do-
6. 269772 28.2.99 -do- -do-

7. 269773 31.3.99 -do- -do-
8. 269774 30.4.99 -do- -do-
9. 269775 31.5.99 -do- -do-
10. 269776 30.6.99 -do- -do-

3. The Accused agrees undertakes and guarantees that the said postdated cheques shall be honoured on first present of their respective due dates and also irrevocably undertakes.

(iii) To honour the said cheques upon their presentation for payment by the complainant.

(iv) Not to intimate their bankers to stop that payment on any of the cheques delivered to the complainant.

(v) Not to close their bank account without obtaining the complainant's prior permission in writing and

(vi) Not to give any notice requesting the complainant not to present any of the said cheques on their respective due dates.

5. It is expressly understood between the parties hereto that upon receipt of the final instalment, as agreed, the complainant shall withdraw the said Criminal complaints.

6. The Accused are aware that in the event of any default in payment of any one of the installments on the part of the accused to honour its commitment, as per the above schedule, the complainant shall be at liberty to proceed against the accused in the concerned court and press for appropriate reliefs in the said criminal complaints.

Dated this 9th day of September, 1998.

For Electrex Ind. Ltd.
Sd/-
Anand V. Hedge,
Chairman and Managing
Director.

From the perusal of these "Consent Terms", I find that it is incorrectly stated by the petitioners that after this

agreement, the respondent No.2 has to withdraw the complaints. It is expressly agreed upon by the petitioners that only after receipt of final installment, the complainant shall withdraw the criminal complaints. It is a case where the very first cheque given, as what stated by the counsel for the respondent No.2, has been bounced. The agreement to withdraw the complaints could have been pressed in service only where the last cheque has been encashed. In para-6 of the agreement, the accused in the complaints, the petitioners herein, agreed that in the event of any default in payment of any one of the installments on their part, the complainant shall be at liberty to proceed against the accused in the Court and press for appropriate relief in the criminal complaints. This term of the "Consent Terms" clinches the issue and in the eventuality of accused failed to honour their commitments, as per the schedule in the consent terms, the respondent No.2 shall be free to proceed with the criminal complaints and that what it has been done in the present case. On first default in payment of installments i.e. the dishonour of the cheque, it is open to the respondent No.2 to proceed against the petitioners in complaints and rightly it has proceeded. In the facts of this case, this agreement is of no help to the petitioners in this case. This is nothing but only a dishonest plea on the part of the petitioners in this case. Learned Criminal court below was perfectly legal and justified in its approach to take cognizance in the complaint and issue summons for securing their attendance in the Court to the petitioners.

Re.: Point No.3:

##. Under section 138 of the Act, 1881, the drawers of the dishonoured cheques are to be punished for their criminal liability but the payee of the cheques will not get the money. It is a criminal liability of the drawer of the cheque. For the recovery of the amount, the payee of the cheque has to file appropriate civil suit. It is not the law nor it is the case of the petitioners that on conviction or discharge of the drawer of the dishonoured cheque, he is relieved of his liability to pay the debt. That liability still continues and for the recovery of that amount, the payee has to file a suit. This has to be filed within limitation. In this case, the respondent No.2 has filed the civil suits in the Bombay High Court and those suits have been decreed but therefrom it cannot be taken that these criminal complaints could not have been pressed by the payee and the Court has to go to the extent of quashing and setting aside of the same.

Leaving apart this legal aspect, otherwise also, it is not the case of the petitioners that the decreetal amount has been paid by them to the respondent No.2. This point raised again is nothing but only a dishonest plea taken by the petitioners and only on the basis of which no relief can be granted to them in this case.

##. The last point raised regarding the maintainability of the criminal complaint in view of the arbitration clause in the agreement dated 24-8-95, it is suffice to say that there is no such condition in that agreement, and otherwise also, if such condition is there, I have my own reservation whether it could have been pressed in service to the extent to pray for quashing and setting aside of the criminal complaints. Arbitration clause may be of any help to the petitioners as a defence available to them, in the suit filed for recovery of the debt. From the facts of this case, I find that even this arbitration clause is not pressed by the petitioners in the suits filed by the respondent No.2 for recovery of this amount in the Bombay High Court. The decrees have been passed, may be on the basis of agreement i.e. dated 19-9-98. This point raised in these petitions has no merits. This is a criminal liability and on proof of the ingredients for the offence as provided under sec. 138 of the Act, 1881, the petitioners appropriately be sentenced on conviction. This contention raised by the petitioners is also devoid of any substance and merits.

##. The approach of the petitioners to this court at this stage in a criminal complaint filed by respondent No.2 in which cognizance has been taken and summons were issued to the petitioners for their appearance in the court is wholly misplaced. After issue of summons by Magistrate in the criminal complaint, the accused have ample opportunity to present their case before the court concerned and it is no more res-integra that the court has all the power to discharge or acquit them of the offence, if no offence is made out. At such a stage, this direct approach to this court by petitioners is difficult to appreciate. The petitioners in such matters have efficacious alternative remedy for redressal of their grievances. The litigant should have permitted the law to take its own course and any petition circumventing that course if filed directly before this court has to be discouraged. Not only this that the petitioners have efficacious alternative remedy to approach to the Magistrate in this matter with their grievance, but against the order, if it goes against them, they have another efficacious alternative remedy to go to the court of Sessions under Section 397 of Cr.P.C. At this stage,

even revision application may not be competent before the Sessions Court and if that is the position then how far it is justified for the petitioners to file this petition in this court under Article 227 of the Constitution. Reference here may have to the decision of the Apex Court in the case of Khacheru Singh v. State of U.P. and anr. reported in AIR 1982 SSC 784(2), wherein, their Lordships of Hon'ble Supreme Court held:

"Heard counsel. Special leave granted.

2. We do not see any justification though we are not expressing any opinion on the merits of the case, for the order passed by the learned Additional Sessions Judge, Merut in Criminal Revision No.83 of 1979, which was affirmed by the High Court of Allahabad by its order dated 7.5.80. All that the learned Magistrate had done was to issue a summons to respondent No.2 Satyavir Singh. If eventually, the learned Magistrate comes to the conclusion that no offence was made out against Satyavir Singh, it will be open to him to discharge or acquit him, as the case may be. But it is difficult to appreciate why the order issuing "summons" to the accused should be quashed. We, therefore, set aside the orders passed by the Sessions Court and the High Court, restore that of the learned Special Judicial Magistrate, First Class, Merut, dated February 2, 1979 and remit the matter to the trial Court for disposal in accordance with law.

3. The appeal shall stand disposed of in terms of this order.

Order accordingly"

##. The conduct of the petitioners that after filing of the criminal complaints they agreed to make the payment of the amount in installments and postdated cheques were issued but they could not stand to their commitment, and now by taking these technical points are praying for quashing and setting aside of the complaints, is nothing but only a dishonest one. In the petition under Article 227 of the Constitution, the conduct of the litigant is very very relevant and important and where the Court is satisfied that it is dubious or it is nothing but only an act on their part to abuse the process of the Court or to make all attempts not to pay the amount to the payee of the dishonoured cheque though debt is admitted, the petitions can be dismissed without going on the merits of

the matter. Here, this course has not been adopted but for this conduct as well as these are the matters where the petitioners have abused the process of the Court, exemplary costs has to be awarded in favour of the respondent No.2 and against the petitioners. The respondent No.1 has also to be awarded costs in these matters as it is neither necessary nor proper party in the case.

##. In the result, all these special criminal applications are dismissed. Rule is discharged in each petition. Interim relief, if any, granted stands vacated in all these cases. The petitioners are directed to pay Rs.10,000/as costs of each petition to the respondent No.2. The petitioners are further directed to pay Rs.1000/- as costs in each case to the respondent No.1.

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Pvv/zgs/Sunil